

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of SBC Communications Inc.)	
For Forbearance Under 47 U.S.C. § 160(c))	
From the Application of the)	
Five-Year Recovery Period for)	
Local Number Portability Costs)	CC Docket No. 95-116
Under 47 C.F.R. § 52.33(a)(1))	
)	
Petition of SBC Communications Inc.)	
For Waiver of the Five-Year Recovery)	
Period for Local Number Portability)	
Costs Under 47 C.F.R. § 52.33(a)(1))	

SBC’S REPLY COMMENTS

Other than Verizon, none of the commenters in this proceeding addresses the core legal principles underlying SBC’s petitions. Specifically, they fail to address the merits of SBC’s arguments that relief from the Commission’s five-year limitation on the imposition of the LNP implementation cost recovery charge in this instance is not only fair and just, but necessary to effectuate the Commission’s statutory obligation to ensure that all carriers bear the costs of establishing local number portability in a competitively neutral manner. They also fail to refute in any way the merits of SBC’s arguments that obdurate adherence to the five-year limit in this instance contravenes the statutory forbearance criteria. Nor do they dispute the factual linchpin of SBC’s petitions: that the access line projections upon which SBC’s LNP charges were based were vastly overstated, thus resulting in a substantial LNP cost recovery shortfall. Finally, and perhaps most tellingly of all, none of the commenters contests SBC’s observation that it would be arbitrary and capricious for the Commission to deny SBC relief here, while granting similar

relief to BellSouth and Sprint in previous orders, on the ground that here (unlike in those cases) the recovery shortfall was “unforeseeable” in 1999, when the LNP charge was set. As SBC has explained, the Commission cannot rationally reward outright negligence (as it did in granting relief to Sprint) and then penalize SBC for its reasonable conduct under the circumstances.

DISCUSSION

The Michigan Public Service Commission (“MPSC”) asserts—without any substantive analysis—that neither the Commission’s *BellSouth Order* nor its *Sprint Order* supports SBC’s petitions.¹ To the contrary, SBC’s entitlement to relief follows *a fortiori* from the Commission’s decisions to allow BellSouth the opportunity to recover its costs associated with intermodal LNP and to allow Sprint the opportunity to recover the shortfall caused by Sprint’s error in calculating its intermodal LNP charge. In its orders granting BellSouth’s and Sprint’s waiver petitions, the Commission held that allowing BellSouth and Sprint to recover their cost recovery shortfalls was consistent with the Commission’s “good cause” waiver standard, *i.e.*, that such recovery did not undermine the policy objectives underlying the Commission’s rules, that special circumstances warranted deviations from the Commission’s rules, and that granting the waivers would serve the public interest.² Each of those requirements is similarly met by SBC’s petitions.

First, SBC’s request will not undermine the policy objectives underlying the Commission’s rules. To the contrary, SBC’s request is fully consistent with the Commission’s “first stated policy goal” of affording all carriers a reasonable opportunity to recover their costs

¹ *MPSC Comments* at 2-3.

² Order, *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, 19 FCC Rcd 6800, 6806 ¶ 11 (2004) (“*BellSouth Order*”).

of implementing local number portability.³ That goal is a direct result of the Act's requirement that the Commission develop a competitively neutral mechanism for enabling carriers to recover their LNP costs.⁴ As set forth in its petitions, SBC does not seek to recover any additional costs beyond those already determined by the Commission to be reasonable and lawful. Nor does SBC seek recovery of any costs it did not, in fact, incur. Furthermore, allowing SBC to complete its cost recovery beyond the initial five-year period prescribed by the Commission will not undermine the avowed purpose of the five-year period, which was to avoid increased interest costs that would be created by a longer period of recovery.⁵ In this instance, SBC does not propose to recover any additional interest costs. In short, SBC's waiver request is fully consistent with the policy objectives underlying the Commission's LNP cost recovery rules.

Second, SBC's request, like BellSouth's, arises from a special circumstance.⁶ Just as BellSouth and other ILECs were "unable" to include the costs of intermodal local number portability in their original end-user charge cost calculations,⁷ SBC was unable to predict that access lines would decrease so dramatically during the five-year recovery period. Similarly, just as the Commission's original "prediction" that incumbent LECs would be able to recover their costs of intermodal local number portability in their original cost recovery tariff filings proved to

³ *BellSouth Order* ¶ 12.

⁴ 47 U.S.C. § 251(e)(2).

⁵ Third Report and Order, *Telephone Number Portability*, 13 FCC Rcd 11701, 11777 ¶ 144 (1998) (*"Third Report and Order"*).

⁶ *BellSouth Order* ¶¶ 10, 13.

⁷ *BellSouth Order* ¶ 10.

be incorrect,⁸ SBC's prediction that the historical trend of access line growth would continue throughout the five-year recovery period proved to be incorrect. And, just as "[i]mplementation issues rendered speculative the amount of costs associated with wireless LNP implementation,"⁹ there was no way to predict in 1999 the dramatic decline in SBC's access lines that occurred from 1999 to 2004, and, for this very reason, SBC's LNP charges were, in retrospect, "unreasonabl[y] low."¹⁰ Moreover, as SBC set forth in its petitions, even if it *had* the wherewithal in 1999 to predict, for the first time in seventy years, that its line count would actually decrease over the next five years, SBC likely could not have effectuated that prescience to prevent its shortfall. The *BellSouth Order* makes clear that the Commission "does not permit recovery of speculative costs, and, to the extent that any carrier sought such recovery [in the LNP context], it was rejected."¹¹ It is entirely appropriate now for the Commission to remedy the circumstances leading to SBC's shortfall by allowing SBC the opportunity to recover the full amount of costs previously approved by the Commission. "As the courts have held, 'waiver processes are a permissible device for fine tuning regulations, particularly where, as here, the Commission [has] enact[ed] policies based on 'informed prediction.'"¹²

⁸ *BellSouth Order* ¶ 12.

⁹ *BellSouth Order* ¶ 12.

¹⁰ *BellSouth Order* ¶ 17.

¹¹ *BellSouth Order* at 6807-08 ¶ 13.

¹² *BellSouth Order* ¶ 15, quoting *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 181 (D.C. Cir. 1993).

Finally, as with its decision allowing BellSouth the opportunity to recover intermodal LNP costs, allowing SBC the opportunity to recover the full amount of its authorized local number portability costs is consistent with the public interest. More specifically, it is necessary to fulfill the requirements in the Act and the Commission's rules that local number cost recovery be competitively neutral.¹³ In justifying its disparate regulation of ILEC and non-ILEC cost recovery, the Commission assured ILECs that they would have a "reasonable opportunity to recover their costs" and would not be placed at a "competitive disadvantage" as result of the Commission's number portability recovery mechanism.¹⁴ Just as the Commission determined that it would not be competitively neutral to disallow BellSouth to recover its costs of intermodal local number portability while allowing non-incumbent LECs to do so,¹⁵ refusal *ex post* to compensate for the failures of the *ex ante* assumptions built into the cost recovery mechanism would run afoul of the requirement that the cost recovery mechanism be competitively neutral.

Similarly, there is no reasonable or legally defensible basis for the Commission to deny SBC the same opportunity to correct its own LNP "cost recovery deficit" that the Commission afforded Sprint.¹⁶ Sprint's shortfall was the result of its own admitted calculation error.¹⁷ In allowing Sprint the opportunity to remedy the shortfall caused by its own negligence, the

¹³ 47 U.S.C. § 251(e)(2).

¹⁴ *Third Report and Order* ¶ 139.

¹⁵ *BellSouth Order* ¶ 15.

¹⁶ Order, *Telephone Number Portability; Sprint Local Telephone Companies Petition for Waiver*, CC Docket No. 95-116, DA 04-3881, ¶ 3 (Dec. 13, 2004) ("*Sprint Order*").

¹⁷ *Id.* ¶ 7.

Commission concluded that, because there was no dispute that Sprint had under-recovered its costs, “the public interest weighs in favor of allowing Sprint to correct” that error.¹⁸ It would be unreasonable and legally unjustifiable, as well as patently unfair, to deny SBC the opportunity to remedy its shortfall on the ground that it resulted from unforeseen developments beyond the carrier’s control, rather than from the carrier’s own error, as was the case with Sprint. The Commission would have no plausible basis for rewarding negligence while punishing diligence. In short, there is no rational basis for distinguishing the relief sought here from the relief sought and granted in the *Sprint Order* and *BellSouth Order*, and, having granted relief in those decisions, it would be arbitrary and capricious to deny the relief sought by SBC.¹⁹

ACUTA claims that the Commission made a commitment that there would be a five-year limit on the LNP fee assessed to consumers.²⁰ As SBC demonstrated in its petitions, however, allowing the limited opportunity to recover the full amount of its LNP costs previously authorized by the Commission is wholly consistent with the public interest as well as the Act’s

¹⁸ *Id.* ¶ 2.

¹⁹ The Michigan Public Service Commission suggests that the Commission’s *BellSouth Order* and *Sprint Order* are inapplicable here because neither BellSouth nor Sprint sought to re-impose charges on customer bills and because SBC did not file its petitions until a year after the five-year period had concluded. *MPSC Comments* at 2-3; *see also CPUC Comments* at 2-3. As a factual matter, it is incorrect that the *BellSouth Order* did not result in the re-imposition of LNP end user charges. The *BellSouth Order* was released in April 2004. The end of the five year recovery period for SBC’s LNP charges, however, occurred in January 2004. The *BellSouth Order* thus permitted carriers to re-impose LNP charges beginning in June 2004 for recovery of intermodal LNP costs. Moreover, the mere fact that SBC did not file its petitions in this instance during the five-year recovery period is assuredly a difference without any distinction. SBC’s petitions are supported by the same legal and policy considerations underlying the Commission’s *BellSouth Order* and *Sprint Order*, and it makes no difference that SBC seeks to recover these costs slightly later rather than slightly sooner.

²⁰ *ACUTA Comments* at 1.

requirement that that LNP costs be “borne by all telecommunications carriers on a competitively neutral basis.”²¹ Indeed, the only “commitment” made by the Commission was that its rules, despite their disparate treatment of ILECs and non-ILECs, would nonetheless give ILECs “a reasonable opportunity to recover their costs.”²² It is that opportunity that was denied as a result of the unprecedented loss of access lines during the period the LNP charge was assessed, and it is that opportunity that SBC seeks to fulfill through its petitions.

ACUTA also complains that SBC’s petitions would allow imposition of the LNP fee “in perpetuity.” That also is not true. SBC seeks only the opportunity to recover the specific amount it was unable to recover during the five-year limitation imposed by the Commission. SBC agrees that in granting such relief, it would be appropriate for the Commission to establish a “fixed and limited period of time” in which SBC could recover that shortfall.²³

In addition, ACUTA and the California Public Utilities Commission (“CPUC”) assert that SBC has not provided sufficient support for the dollar amount of its calculated shortfall.²⁴ That is both untrue and, for present purposes, irrelevant. First, in his supporting Declaration, John Connelly identifies the amount approved by the Commission (\$1.275 billion), the amount collected by SBC (\$1.027 billion), and the amount SBC seeks to recover (\$211 million). Mr. Connelly also explains that the difference between SBC’s actual LNP shortfall (\$248 million)

²¹ 47 U.S.C. § 251(e)(2).

²² *Third Report and Order* at 11775 ¶ 139.

²³ *ACUTA Comments* at 2.

²⁴ *ACUTA Comments* at 2; *CPUC Comments* at 3-4.

and the amount it seeks the opportunity to recover is attributable to a unique situation in California in which SBC did not impose the LNP surcharge on certain customers because of limitations in their service contracts with SBC. Mr. Connelly's Declaration thus provides sufficient support for the dollar amount of SBC's shortfall.²⁵

More fundamentally, the precise dollar amount of SBC's shortfall is not relevant to the issue currently before the Commission. That issue is whether there is a legal basis for the Commission to forbear from or waive its rules limiting the recovering period to five years. SBC clearly has demonstrated—and the commenters barely dispute—that the governing law (as discussed above) requires the Commission to allow SBC the opportunity to recoup any unrecovered LNP costs. As Verizon proposes, the Commission should grant the legal relief SBC has requested, and then allow SBC to propose “a recovery rate and time frame” for such recovery.²⁶ At that time, as it did when it reviewed SBC's initial LNP charge tariff filings, the Commission can thoroughly review SBC's calculations, and decide upon an appropriate rate and time period for the recovery of the shortfall.

²⁵ SBC provided additional support to the CPUC Staff in response to its data requests. SBC's responses provided CPUC Staff with the underlying calculations and detailed documentary support of the LNP revenue shortfall calculations identified by Mr. Connelly in his supporting Declaration. The CPUC inaccurately asserts that SBC was not responsive to the CPUC Staff's data requests. *CPUC Comments* at 4. To the contrary, SBC was fully responsive not only to the first set of data requests submitted by the CPUC Staff, but also to multiple additional requests issued by the CPUC Staff.

²⁶ *Verizon Comments* at 7.

CONCLUSION

The Commission should forbear from applying, or waive application of, its rule limiting to a five-year period SBC's ability to recover its authorized LNP implementation costs, and should allow SBC to take the steps necessary to recover those LNP costs.

Respectfully submitted,

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